

1892

# The Right to Privacy

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GRADUATION THESIS.

WRITTEN FOR DEGREE OF L L. B.

THE RIGHT TO PRIVACY.

---BY---

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## THE RIGHT TO PRIVACY.

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This is a subject that has just begun to assume importance and attract attention. It has been little discussed and that very recently. In Vol. IV., No. 5, of the Harvard Law Review for December, 1890, this right was very ably supported by Samuel D. Warren and Louis D. Brandies. And it was also touched upon in the July number of Scribners Magazine for 1890, by E. L. Godkin at pages 65-67. From both of these articles I have received very material assistance, especially from the article in the Harvard Law Review. There is one adjudicated case bearing directly on this right, Schuyler v Curtis, 15 N. Y. Supp. 787, of which more anon.

Although this right has never been recognized judicially until recently, that is as the right to privacy, it may be said to have been admitted



under fictions and in connection with other subjects.

The nature of this right is so metaphysical, and, as it affects simply the ease and comfort of the individual, his happiness and peace of mind, and his sense of security, a great deal of difficulty is to be expected in getting the courts to recognize it in its entirety at once. They must adopt it piece by piece, particle by particle, halting at times, but I think, finally, recognizing it fully. The same difficulties are to be met with in this case as in the treatment of any new subject. Judges are very reluctant to depart from their accustomed routine and deal with new subjects, requiring different principles and rules to govern them.

The right to privacy, as it is to be treated in this discussion, means: the right that a person has to keep to himself his affairs and relations that are of a purely private nature and do not affect materially his relations with persons with whom he is to deal; or in case he is a public officer, or a candidate for such office, do not tend to inform the people of his capacity and ability to discharge the duties that are, or may be, imposed upon him. It is the right as Judge Cooley says

in his work on Torts, 2nd. ed. p 29, "to be let alone".

What can be of more value to a man than a sense of security in his person, property and private affairs?

No man can do as well, feel as well, or be of much value to the community, when he is unhappy. Can a man be happy and contented with life, when he knows that his domestic relations, his private dealings, and his general life, no matter how good and virtuous these may be, are laid bare to the scrutiny and criticism of the public? There are a few, who are so desirous of publicity, that they will even go so far as to commit a crime in order that they may secure notoriety; that they may have their names and accomplishments, on the lips and in the minds of men. But this class of people is comparatively small and of little importance. The great majority of men desire quietude, peace and comfort, and freedom from criticism. July No. Scribners Magazine. ("The Rights of the Citizen ", by E. L. Godkin, pp. 65-67)

The scrutinizing eye and bare faced effrontery of the press, in seeking every opportunity of giving some news, or revealing something that may gratify some morbid taste; new inventions and mechanical devices, particularly

that of the camera, have long made it apparent that there ought to be some restraint in their exercise.

Not only does it give pain to the individual to have his private affairs and his domestic relations made public; but it lowers the morality of the people at large. Every fresh bit of gossip and scandal pleases the taste of some, and by a continuous display to the public view secures new followers. So that minds that are capable of other and better things are diverted from their usual course, and follow this spicy and scandalous news, much to their detriment. The nature of the news, appealing as it does to the weak side of human nature, makes it more interesting and, therefore, more detrimental to the public morality.

The value of this right to the community and to the individual being shown, the question then is, Does the law recognize it? Will it protect it? As there is no statute on this subject, we must search the common law. In searching this we find no decision directly in point, but the elasticity and continuous growth of the common law to cover new subjects; to deal with new inventions; to adapt itself to the varying and ever advancing civilization; gives us hopes that it will extend its

protecting folds and cover this right.

The common law is nothing more or less than the policy of the people, as strengthened and adapted to practical use by usage, which is the evidence and proof of its general fitness and common convenience. (Norway Plane Co. v Boston & the R. R. Co., 1 Gray 267.) Were this not so, any new invention, any new business, as rail roads, tel~~l~~egraphs and the like, would be practically without any law to govern them, until some statutory provision had been made. It would be very difficult, almost impossible, to construct a statute that would govern the new invention or business in all its details; while the common law composed of a very few general principles, that are elastic and capable of adapting themselves to any state of affairs that fall within its domain, will be applicable.

From these general rules the tribunal forms particular rules that will apply more specifically to the subject in hand; so that, finally, the new subject will have a law of its own governed by rules that belong to it alone.

What was policy to the people centuries ago, ~~in the~~

in the then crude times, cannot be said to be policy now. The people of a necessity have adopted a new policy. They live and conduct their affairs in a different manner. They have adopted new rules. To go back and govern ourselves by the common law of that time, would be an absurdity. I do not claim that all the rules of the early common law should be abolished; on the other hand, many of them will apply to day, but only those that are adapted to our changed position and circumstances.

Controversies, as to this right, did not arise at early common law because it was not violated to any extent. It was not violated because there were no such opportunities as we have to-day. The newspapers were of little importance; the crown restricted their publication and circulation; the art of photography was unknown. As the wrong in the violation of this right consists of the injury to the feelings of the party, if he never hears of the violation of this right, he is not injured. There was of course some gossip and discussion of the private affairs of people in the early times, but the person gossiped about seldom knew of the gossip and consequently was not injured. As long as the

gossip continued to be by word of mouth, it was rarely brought to the persons knowledge. (Scribners Magazine, July No. 1890, p 66.) So at early common law this right was not violated to any great extent. But now that the newspapers devote many columns to such gossip, the person sees it and is under the impression that everyone he meets knows of his various little indiscretions and his private affairs. (Scribners Magazine, July No. 1890. p 66 )

Even if the attempt to protect this right had been made, the courts would have failed to grant relief; because in early times the common law judges became the slaves of precedent. They came to be so rigid in their dealings with cases, that they would not recognize any new principles. In fact the common law, instead of being unwritten came virtually to be written. The judges were as unable to depart from their old ruts and take cognizance of new principles, as if the common law had been reduced to a statute. (See Pomeroy's Eq. Juris. Vol. 1, # 16.)

This state of affairs could not exist for any great length of time, so the court of equity was instituted, havin

as its foundation justice and reason. The court of equity continued as a separate tribunal for some time. The common law judges, gradually giving up their technicalities, began to take cognizance of the right and wrong in a case, (Pom. Eq. Juris. Vol.1., #17.) until, finally, the court of equity as a separate tribunal, has ceased to exist in England and in most of the States of this country. During this condition of the early courts it would have been very difficult to have the courts recognize this principle, doubly so because of its metaphysical character; but now the courts recognize the fact that only a part of mans enjoyment of life lies in material things.

Considering the state of affairs in early times, we find that there was no practical violation of the right to privacy; and therefore, no need of the establishment of a rule of law that would give relief in case of its infringement. Then, in early times, there were no rules of law applying to railroads and telegraphs, because there were no such existing occupations. But the readiness, with which the common law was brought to

bear on these occupations; and from its broad principles a law/applicable to these new industries was gradually developed, leads us to reason that now that the right to privacy is violated, and finding so many reasons for its protection, the common law will securely protect it.

I think the foregoing description of the elasticity and mobility of the common law would be sufficient to establish this right, but there is another and fully as strong an argument in its favor.

Although there is only one decision that holds in terms that a person has this right to privacy, this right is virtually recognized by giving<sup>the</sup> injured party protection; but basing the reasoning on some fiction that has little to do with the justice of the case.

One instance of the protection of this right is by permitting the writer of letters to enjoin their publication. A great deal of difficulty was experienced in getting the courts to recognize this right. They saw that it was no more than proper that a person should be permitted to enjoin the publication of his letters;



but did not find at once upon what ground to grant the desired protection. Finally it was held to be a breach of trustor confidence, that the writer reposed in the receiver. (Abernathy v. Hutchinson, 3 L. J. Ch., 209) It was very difficult to see how the causal recipient of a letter accepted any trust. (Harvard Law Review, Vol. No.5, p 201.)

This doctrine of the trust would not protect the writer as regards third persons who should get control over the letter; so, finally, the courts adopted the fiction that the writer had a property right in the letters. Some courts distinguished between literary letters, those which the writer intended to publish for profit, and ordinary business or friendly letters; and one court refused to enjoin the publication of mere friendly letters, because they were not of a literary character. (Hoyt v. Mackenzie, 2 Barb. Ch. 220.) But at last Judge Story, in Folsom v. Marsh, (2 Story; Myres Federal Decisions.) said " that he was not prepared to admit of the soundness or propriety of the supposed distinction between letters of business or of a mere private or domestic character, and letters which from their contents and character, are treated as literary compositions. In the first case I

hold that the author of any letter and his representatives, whether they are literary compositions, or familiar letters of business, possesses the sole and exclusive copyright; and that no person, neither those to whom they are written, nor other persons have any right or authority to publish them upon their own account or for their own benefit. The general property and the general rights incident to property, belong to the writer whether the letters are literary compositions, or familiar letters or details of facts or letters of business." It is very difficult to see what property a person can have in a few casual remarks, remarks that are reduced to writing, remarks that he never intended to make any money by. It is not the writing that is the subject of protection, but the expressed thoughts; so it ought to make no difference whether the words are spoken or written, whether an act or deed; ( Harvard Law Review, Vol. IV., No. 5, p.206.) and it makes no difference whether they are of any pecuniary value or not, If a person has a right to keep his expressions to himself, he ought to be allowed to keep his acts and deeds secret. I think it may be said, that in these cases, it is simply the right to privacy that is recognized. If the courts must base their decisions on the right to property, they can extend it to cover all

a persons private dealings under the definition of property given in Andersons Law Dictionary: property is there defined as "that which is ones own, something which belongs or inheres exclusively to an individual person. In an abstract sense, ownership, title, estate, and right." Property as thus defined , will include every right that man has, but by the courts and by the common acceptation, the term property is used in a restricted sense. The term property is used as applied to something, that a person can exchange and get value for; something that the people as a moral and intellectual class desire; something that has a value pecuniarily, as recognized by good society, guided by a fair standard of morality. Why not confine the term property to its generally accepted sense and thus do away with this technicality and fiction?

Another instance where the right has been recognized, but under a fiction, is in the case of photography, Where a photographer has, at the request of a customer, taken a negative of the customer and then developed pictures for his own benefit,; the courts have implied a term into the contract, namely, that the photographer shall make only so many pictures as the customer shall order. (Pollard v. Photographic Union, 40 Ch. D. 345.) In the case where the

person enters into a contract with the photographer and consciously sits while the photographer takes a negative, this implied term will give the person the desired protection. But how is a condition to be implied when the picture is taken surreptitiously which process is rendered very easy by modern appliances. Does not the person wronged merit protection just as much in the one case as in the other? But if the precedent that is established, is followed closely, the injured party will have no remedy in the latter case. This, of course, is obviously unjust. The practical way of giving the injured person the desired protection, is to say that the policy of the people has changed; that the creation of new machinery and new inventions, demands a broader and a different policy; and in this particular case, that the facility of taking pictures surreptitiously, demands the recognition of the right under its proper head, - the right to privacy.

These two instances heretofore stated are the most prominent and best illustrate the readiness of the courts to protect this right and their position in basing their recognition on some fiction. There are more cases in which this right has been protected by means of fictions; but it is unnecessary to state them. One court, at least

has come out boldly and recognized this right, and called it the right to privacy. It was a Supreme Court of the State of New York- the State that has been foremost in perceiving injustice, and granting relief - The case is Schuyler v. Curtis, ( 15 N. Y. Supp., 787.) In this case a certain organization of women had determined that some of the most prominent women in the United States should be called attention to in the women's department of the Worlds Fair; so they procured funds sufficient to erect statues of some of the leading women. They finally determined to have statues made of Susan B. Anthony, entitled "the modern women reformer", and another of Mrs. Schuyler, entitling it "the woman philanthropist". Mrs. Schuyler, during her life, had been very benevolent and had given much to alleviate the sufferings of the lower classes. She was of a retiring disposition, disliking prominence of any kind. Her nephew, the plaintiff in this suit, brought the action in the interests of the relatives of Mrs. Schuyler, for an injunction restraining the building and exhibition of the statue of Mrs. Schuyler. The injunction was granted on the ground that the relatives of Mrs. Schuyler had a right to the privacy of her name and acts. The court in its decision states explicitly that this would violate

the right to privacy, and in answer to the argument that it was against public policy, said, in substance, that they could not see how it violated public policy, that there was no reason why people should know that Mrs. Schuyler was a philanthropist; that the erection of her statue and its public exhibition, would bring her name and deeds into a prominence, which both she and her survivors disliked. The fact that it might be beneficial to her does not have anything to do with the case. Persons possess this right and have the sole option to say whether they shall surrender it or not. Judge Brown cites the article in the Harvard Law Review with approbation, saying that everyone ought to read it .

In early times, in many cases, the only way the courts could take cognizance of a new subject and grant relief was by means of a fiction; so that, in those times the fictions were of great value to the people and in the development of the law. But now, with the creation of new devices everyday, that are liable to interfere unduly with the rights of some, it would be almost impossible to manufacture the fictions necessary to give relief. The tendency of the courts now is to transact their business on a

practical basis, trying to secure justice by a short route and in the quickest possible manner. In other words the whole tendency of the courts is toward the so called "law reform". Bearing this in mind, it gives us confidence that the courts will protect this right properly.

I insert here Sir Henry Maines ideas of fictions. (Sir Henry Maine Ancient Law, p 26.) He defines a "Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. " It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time they do not offend the superstitious dislike for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of the law . We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of the law. But at the same time it would

be equally foolish to agree with those theorists, who, discovering that fictions have had their uses, argue that they ought to be stereotyped in our system. They have had their day, but it has long since gone by. It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now legal fictions are the greatest obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell, and a new rule hides itself under its cover. Hence there is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place, and minds of different casts will differ as to the branch of the authorities which ought to be selected. If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which in spite of some recent legislative improvements, are still ~~xxx xxxxx~~ abundant in it." Of course there are many cases in which a person may not assert this right, because, there are others whose interests are effected. Salus



populi supremu<sup>u</sup>lex is the maxim that will apply. The most notable exception is that of a public officer, or a candidate for such office. Any person who holds or proposes to hold a public office, parts with many of his private rights. He becomes prominent; he is discussed; his acts are scrutinized and criticized. It is right and proper that the people should know what sort of men are taking part in their government, and how they are discharging their duties. The officers themselves are benefited. By the discussion and criticism, they learn the will of the people and can proceed accordingly. The argument of public policy would apply here in its strongest sense.

There are also many cases in which a private person may not assert this right. These are generally where the person occupies a sort of quasi public position, depending on the patronage and custom of the people at large, as hotel-keepers, merchants, railroad officials, teachers, lawyers, clergymen and the like. In all these cases the persons are more intimately <sup>connected</sup> with the people at large than others; and, to that extent, that which would be considered private in other cases, is surrendered for the benefit of the public. But in both the case of a public officer and these other named persons, there is, of course

some limitation upon the intrusion into all their relations and dealings. In the case of a public officer or a candidate for office, the people would have a right to know of his general appearance, his ability as a speaker, his former occupation, and the way in which he conducted his business and the probabilities of his successfully performing the duties of the public office. They would not have a right to know every time he bought his wife a present, to know the kind and value of it, and any special exhibition of affection.

This right of the people to know everything about the person who holds a public office, or is about to assume the duties of one, is one that has every argument in its favor. It is especially so in a republican form of government, where the officers are chosen from and by the people; chosen generally on account of their peculiar ability to perform satisfactorily, all the duties that may devolve upon them in the discharge of their trust. In order that the people may be able to select those that will be best able to participate in the management of public affairs, there must be discussion; and, as many of the people have never seen the officer or candidate, his photograph may be taken and be circulated. His private

business relations may be described , so that the people may acquire the requisite information necessary for them to make a wise selection of candidates, and, likewise to determine the advisability of keeping the present incumbent in office.

In the case of other persons, not properly entitled to claim the full protection of this right, as hotel-keepers, for example, the public has a right to know the size of their hotels, the number and arrangement of the rooms , the general facilities for the accommodation and comfort of guests, and the manner of conducting the business. And so with a merchant; but it would not be said that the landlord's or merchant's private room or house could be thus described, that is, the shape and size of the rooms and the like.

And in the case of an actor, the public have a right to know and discuss within proper limits, his acting and general appearance; the quality of his voice and his general demeanor. Clergyman, lawyers, public lectures, and the like, also lose some of the rights that they would ordinarily possess. It may be said that they are interesting speakers, the quality of their voices, their fluency etc may

be commented upon.

The general rule that may be formulated from these various cases is: When a person depends on the patronage of the public at large, and holds himself out as ready to respond to any call that may be made upon him in his line of business, the public has a right to know any fact or <sup>that</sup> quality directly affects his ability to discharge the duties that will devolve upon him in his general line of business. Of course all a persons acts and relations will to some extent, affect the readiness with <sup>which</sup> a person will select him to take charge of his own matters; but it is quite obvious that the line must be drawn somewhere, so I have said, "any matter that directly affects his ability etc" I do not want to draw a rigid line, but simply one that is ~~adopted~~ to common sense. Every case will be govern<sup>ed</sup> ed by its own peculiar features, but ~~adapted~~<sup>a</sup> from the <sup>1</sup> gen-  
eral rule as far as possible.

Another exception is the necessary disclosures of private matters in courts of justice, to the legislature, and to quasi public corporations. This exception, as are all the others, is due to the fact that the rights of other people are affected; rights that are of more import-

ance than the right to privacy. But in all these cases, the right must receive careful attention, and be violated only so far as necessary, and when the only practically convenient way of accomplishing the desired object.

This right to privacy must be distinguished from slander and libel ; although in their means of violation and nature of its accomplishment, they very closely resemble this right, and might unthinkingly be confounded with it. But the great distinguishing feature is that in slander or libel some direct pecuniary interest is affected. In order that an action for slander or libel may be maintained the person bringing the action must have sustained some pecuniary loss. But as in other injuries where the injury has been maliciously done, the mental suffering endured by the plaintiff, may be taken into consideration as an element of punitive damages. In order to start the machinery of the courts the injury, in some way, must have injured his reputation; so as to prevent or restrict his dealings with his fellow citizens, and causing them to shun his society.

Having considered the nature of this right, and the probability of its just enforcement and protection by

the courts, our next thought will be, what are the remedies  
In this, as in other cases of tort, there are two remedies;  
the injunction, and the action for damages.

The injunction, where it may be had, will be most  
salutary and will afford the most adequate relief and the  
courts will not have so much abjection to it as they will  
to the action for damages. In the case of an injunction,  
the injured party can have full and complete relief and  
accomplish his object, that is preventing the disclosure of  
that which is private. The relief by injunction has been  
recognized in New York. ( Schuyler v. Curtis, ante)

But where the injury has been done, the right violat-  
ed, it is clear that the person injured ought to have some  
remedy. The only one is the action for damages. And here  
is where we have our difficulty. The action for damages  
in this case will be for injury to the feelings, pure and  
simple.

The courts of the different States are in great  
confusion, as to when damages for mental suffering may be  
allowed. Owing to the confusion of the courts, and to the  
importance of the law of damages in connection with this  
subject, I have determined to treat this branch of the law

somewhat at length.

Some of the courts hold that in order to recover damages for mental suffering, the injury to the feelings must have been incident to an injury to the person or property and caused by the malice of the defendant, regarding it as punitive damages. ( Greenf. Evid., Vol. II., # 267, note; Wyman v. Leavitt, 71 Me. 227; Illinois R. R. Co. v. Sutton, 53 Ill., 227; Wilson v. Young, 31 Wisc., 582.)

Other courts hold, that where there is physical injury and the mental suffering is connected with the physical injury, a recovery may be had for the mental suffering but not alone for mental suffering. ( Cunnings v. Willingstown, 1 Cush. 452; Ranson v. N. Y. & Erie R. R. Co., 15 N. Y. 415; Oniel v. Dry Dock Co., 15 N. Y. Supp. 841; Terra Haute R. R. Co. v Brinker, (Ind) 26 N.E. 178; Penny v. L. I. R. R. Co., 116 N. Y. 375; Johnson v. Wells Fargo Co., (Nev.) 3 Am. Rep. 245.) In addition to the authorities enumerated above Woods Mayne on Damages, at page 74 says:- "So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and

that which is incident and blended with the bodily pain incident to the injury, and anxiety thereby induced, but in no case has it ever been held that mental anguish alone unaccompanied by an injury to the person might be compensated for. ( See Cooley on Torts, page 271, to the same effect) Thus the rule seemed to be well settled that in order to recover for mental suffering, there must have been some other actual damage.

This lack of a recovery for mental suffering was due to the attitude of the old common law judges. The common law judges have ever since the earliest times had a peculiar fear and dislike to deal with and to estimate the happiness of man, to take into consideration his purely mental operations. This has evinced itself most strongly in the law of damages; but it has also come up in other connections, in contracts , gifts and the like. In the case of a gift for example, no matter how much love, affection or gratitude one may have for another, no matter how intimately he may be interested in anothers welfare, unless certain requisite formalities are gone through with that is, delivery and acceptance, no valid gift can be made. The promise to give is unenforceable; but if the other



person gives something tangible, no matter how insignificant, if there is no undue influence, the gift will be upheld. The position of the courts was due largely, at first, to their inability to estimate the happiness of man to have any standard by which they might be guided. This once established by a case, was followed with slavish persistence. It was greatly modified by introducing fictions, so that the courts might say that they were not awarding damages for mental suffering, although in reality they were as in the action for seduction, the fiction, 'per quod servitum amissit' is resorted to and damages awarded on that basis, but in reality wholly for the injury to the feelings, pride, etc of the parent. This rule continued down to a short time ago with various modifications by the use of fictions, but the courts always required pecuniary damage of some kind even if fictitious.

By the introduction of the telegraph a new way of injuring the feelings resulted. The injury to the feelings in this case is caused by the negligence of the telegraph company in delaying the transmission and delivery of a message announcing the illness or death of a relative or near friend, thus preventing the receiver of the message from being present during the last moments or

attending the funeral of a friend or relative. All the courts do not allow a recovery of damages for mental suffering, when caused by the negligence of the telegraph company in transmitting the message. Those courts which have recognized the right to recover for mental anguish thus caused have made a new rule, or a sort of new fiction, that is, where there is wrong done, a legal right violated, then nominal damages may be allowed; and where nominal damages may be awarded, damages for injury to the feeling may be granted. The fiction is that although they have changed the rule and allow damages for mental suffering unconnected with an injury to the person; they profess to keep within the rule and claim to have made no departure. They allow damages for mental suffering that has no connection with an injury to the person, and this was never done before. They resort to this fiction while at the same time they complain of the old fictions of the common law. The courts are conservative, never departing any more than is necessary from the existing rules to accomplish the desired object in a case. Nearly all the State courts, where this question has arisen, have followed the principles before stated. They are the Following:- (Chapman v

Tel. Co., (Ky.) 13 S. W. 880; *Wagworth v. Tel. Co.*, 86 Tenn., 695; *Young v. Tel. Co.* (N. C.) 22 Am. St. Rep., 883; *Western Union Tel. Co. v. Anderson*, (Ala.) 18 Am. St. Rep. ; *Western Union Tel. Co. v. Broesche*, 72 Tex. 689; *Reese v. Tel. Co.*, (Ind.) 24 N. E. 153.) The last named case did not adopt this fiction but granted relief on the broad ground of justice and reason. In this case Judge Berkshire said:- "Some of the authorities seek to draw a distinction as to the right to recover damages for mental suffering, between cases where there may be a recovery for pecuniary loss and cases where there is or can be no pecuniary loss, to which case the present one belongs. With this distinction , we have no sympathy, and confess we can see no good reason for it to rest upon. When a telegraph company agrees to transmit and deliver a message promptly wherein dollars and cents are alone involved, and its negligence occasions loss it is conceded by all the authorities that it may be compelled to respond in damages. Why? because it has been negligent, broken its agreement, or, as sometimes said, failed to perform a duty which it owed to the sender of the message or to the person to whom addressed, as the case may be."

The position of the courts in allowing this recovery for mental suffering, has many arguments in its favor, though the fiction which they have resorted to does not seem to be appropriate to the reform.

The strongest argument advanced by the judges in the cases that refuse to allow this recovery, is, that case upon case has held to the same effect, and that they will not depart from the precedent thus established. There is reason and some logic in the argument that the injury is so vague, so purely metaphysical and, therefore, so indefinite and apt to be so variable in different persons, that the jury cannot estimate it with any degree of certainty, or have any standard to go by. This same argument would apply to awarding damages for any physical injury. The jury cannot award damages in any case exactly in proportion to the actual damage suffered. The most they can do is to try and do the right thing as nearly as possible. Would an argument that because the jury might ~~be~~ a little wild in assessing damages for a physical injury be sustained for a moment to refuse a recovery? The absurdity of the argument in connection with an injury to the feelings is equally apparent, but in a less degree.

One judge in support of his position that damages for mental suffering solely should not be awarded said:- " It would open the doors to metaphysics, philosophy, and physiology." ( Johnson v. Wells Fargo & Co., 6 Nev. 224; s. c. 3 Am. Rep., 245.) Of course the courts would have to proceed differently have to admit a different kind of testimony; but it would be always to secure justice. A party claims to be injured; it is the duty of the court to give him adequate relief, always having due regard for the rights of both parties. The fact that it would take a court a little more time and be more difficult to ascertain the precise rights of the parties is not a valid reason for refusing to take cognizance at all. There is no case that is adjudicated where perfect justice is done. The plaintiff will either recover more of a compensation than he deserves or less. Even if the defendant may be used a little harshly, is that any reason for letting the plaintiff suffer without any compensation at all? All that can be done is to try and do exact justice as nearly as possible

'tis also said, if such damages were to be allowed, it would promote endless litigation We do not claim that

every little injury to the feelings should be compensated for in a court of law. The same rules would apply to this class of actions as to every other. Take a specific case: if a person brings an action in a court of record in New York for slander, libel, seduction and the like, and recovers less than fifty dollars, he can only recover costs equal to the amount of his verdict; and as the costs in an action of this kind are about one hundred dollars, it would not be a profitable suit. The same provision for actions to recover damages for mental suffering could be made, that is, providing that they could only be brought in a court of record, and if less than fifty dollars were recovered the plaintiff would only be entitled to costs equal to his verdict. So far as the endless litigation argument is concerned, that would have no more weight as applied to, these cases than to any tort or contract action. A person is discouraged from bringing suit for any petty injury.

I need not state how essential to man's well being and prosperity is the state of one's mind; that is all admitted, and the inconsistency of the courts in following those old precedents, is shown, where they will allow

damages in one case and refuse them in another, and at the same time admit that the plaintiff has been injured in both instances, <sup>the</sup> principal being that if there is some other injury to the person or property, damages for mental suffering may be awarded, <sup>A</sup> mere fiction having no value as I see. The courts in the telegraph cases, as I have before shown, have made still another refinement or advancement, allowing damages for mental suffering when nominal damages may be awarded.

Now in the violation of the right to privacy, the person has been injured by another, because a legal right has been violated, and is entitled to nominal damages at least; and following out the late refinement, his mental anguish may be compensated for. I would put it on the broad ground, as Judge <sup>Berkshire</sup> ~~Buxton~~ in Reese v. Tel. Co. intimated, that, where a legal right has been violated, the person injured has a right to such damages as he has suffered; but perhaps it is well to keep within the authorities when the same result is accomplished.

## C O N C L U S I O N .

As the world advances man becomes more sensitive. He is able to appreciate and enjoy matters that to the savage would seem utter folly and nonsense. He feels a greater independence in himself; feels that there are certain things that should be known to himself and his only. He desires a place of retreat where he can feel secure from outside observation. So as civilization advances this right to privacy will become more and more important. Its just protection and enforcement will depend on the attitude of the people toward it . If they do not agitate it; let its violation go on without any particular remonstrance they cannot expect the law to justly protect it For the law is in its nature passive. It is in fact but a resultant of the civilization and learning of the people. While a man is protected in all his business relations, his property and person, will it be said that he can have no protection from the gossip monger?

Vernon Cole



